Cornell Forge Company *and* International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers. Case 13–RC–20777

July 15, 2003

DECISION AND CERTIFICATION OF REPRESENTATIVE

BY MEMBERS LIEBMAN, SCHAUMBER, AND ACOSTA

The National Labor Relations Board, by a three-member panel, has considered objections to an election held June 13, 2002, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 50 for and 34 against the Petitioner, with 4 challenged ballots, an insufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and briefs, has adopted the hearing officer's findings[1] and recommendations,[2] and finds that a certification of representative should be issued.

The Employer objected to the election results, arguing, inter alia, that two prounion employees, Alfredo Aviles and Augustin Zapata, engaged in electioneering near the polling place and that Aviles made threatening statements related to the election. The hearing officer overruled the objections. She found that neither Aviles nor Zapata was an agent of the Union, and that, under the standards applicable to conduct by third parties, their actions did not justify setting the election aside.[3] We agree in both respects.

1. The burden of proving an agency relationship is on the party asserting its existence. *Millard Processing Services*, 304 NLRB 770, 771 (1991) (citing *Sunset Line & Twine Co.*, 79 NLRB 1487, 1508 (1948)). The agency relationship must be established with regard to the specific conduct that is alleged to be unlawful. *Pan-Oston Co.*, 336 NLRB 305, 306 (2001). An individual can be a party's agent if the individual has either actual or apparent authority to act on behalf of the party.

Here, there is no evidence that the Union said or did anything that would give Aviles and Zapata actual authority. Further, the Employer has not demonstrated that Aviles or Zapata had apparent authority because it has shown no Union conduct that could have given other employees in the plant reason to believe that Aviles and Zapata were acting on the Union's behalf.

No agency finding can be based on the fact that both Aviles and Zapata were among 11 employees identified in a letter from the Union to the Employer as members of the Union's in-plant organizing committee, that both wore union insignia during the campaign, or that Aviles frequently spoke in favor of the Union to other employees. The Union's letter to the Employer identifying the members of the organizing committee did not state or imply that those employees were authorized to act for the Union in any respect, and there is no evidence that this letter was seen by, or its contents communicated to, other employees. The Board has long held that prounion employees do not constitute union agents merely on the basis of their "vocal and active union support."[4] *United Builders Supply Co.*, 287 NLRB 1364, 1364 (1988); see also *Tuf-Flex Glass v. NLRB*, 715 F.2d 291, 296 (7th Cir. 1983). Further, employee members of an in-plant organizing committee are not, simply by virtue of such membership, agents of the union. *Advance Products Corp.*, 304 NLRB 436, 436 (1991); *Uniroyal Technology Corp. v. NLRB*, 98 F.3d 993, 999–1000 (7th Cir. 1996). Such in-plant organizers are generally found to be agents of the union only when they serve as the primary conduits for communication between the union and other employees or are substantially involved in the election campaign in the absence of union representatives.[5] *United Builders Supply*, supra at 1365. Those conditions do not exist here. Neither Aviles nor Zapata was the Union's primary employee contact at the workplace. According to Gary

[1] The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We find no basis for reversing the findings.

[2] We adopt without further discussion the hearing officer's recommendation to overrule the Employer's objection to the Union's dissemination of an inaccurate Dun & Bradstreet report. See *Midland National Life Insurance Co.*, 263 NLRB 127 (1982).

[3] In the absence of exceptions, we adopt pro forma the hearing officer's implicit finding that Aviles and Zapata did not engage in objectionable surveillance near the polling place. In any event, our finding that Aviles and Zapata were not union agents would preclude a conclusion that their conduct constituted objectionable surveillance by the Union.

[4] In relying on *Windsor House C & D*, 309 NLRB 693 (1992), the hearing officer inadvertently cited former Member Oviatt's concurrence instead of the Board's decision. We disavow the hearing officer's unintentional implication that former Member Oviatt's concurrence represented the view of the Board and her conclusion, based on that concurrence, that the Board has been "reluctant" to find that members of in-plant organizing committees are union agents.

[5] We do not suggest that in-plant organizing committee members may be union agents only if they are the union's primary conduits for communication or its primary employee contacts. For instance, the Board has found such committee members to be apparent agents of the union when union officials, inter alia, failed to disassociate the union from the employees' actions, allowed the employees to speak on behalf of the union at meetings held by the union for employees, and allowed them to make special appearances with union officials at election functions. *Bio-Medical of Puerto Rico*, 269 NLRB 827, 828 (1984).

Prochnow, the Union's full-time organizer, employee Christopher Bucon, also on the in-plant organizing committee, was Prochnow's primary contact for disseminating materials and served as the Union's election observer.

That Aviles solicited one employee to sign a union authorization card does not make him a general agent of the Union. Under *Davlan Engineering*, 283 NLRB 803 (1987), employees soliciting authorization cards are special agents of the union with regard to the effect of statements they make about union policies, while they are engaged in solicitation. However, there is no contention that Aviles engaged in any objectionable conduct while soliciting authorization cards.

Nor is it material that Aviles apparently told employees that he would be the department steward after the Union was certified. This statement was refuted by the Union's letter informing employees that they would choose their own representatives if the Union won the election. Even if it had not been refuted, Aviles could not make himself an agent of the Union solely by his own statements. See Restatement 2d, *Agency* § 285 (1958).

Further, the Employer has produced no evidence that the Union was aware of Aviles' and Zapata's allegedly objectionable conduct, and therefore there is no support for the Employer's claim that the Union ratified Aviles' and Zapata's statements and action by failing to repudiate them. See, e.g., *Pierce Corp.*, 288 NLRB 97, 101 (1988). See also *United Builders Supply*, supra at 1365; *Tuf-Flex Glass v. NLRB*, supra at 296.

Accordingly, we agree with the hearing officer that Aviles' and Zapata's conduct during the campaign cannot be attributed to the Union. The cases cited by the Employer are inapposite, as they involve employees with far more substantial indicia of union authority.[6]

2. The hearing officer correctly found that, under the Board's standards for objectionable third-party conduct, neither the alleged electioneering by Aviles and Zapata, nor the alleged threats by Aviles justify setting aside the election.

The Employer concedes that Zapata's conduct is not objectionable under the third-party electioneering standard.

Even if all credibility issues were resolved in the Employer's favor, Aviles' conduct would not warrant setting the election aside. His electioneering conduct consisted, at most, of speaking without threats in favor of the Union at his own workstation, which was outside the voting area. This conduct did not substantially impair the employees' exercise of free choice. See *Rheem Mfg. Co.*, 309 NLRB 459 (1992), enfd. mem. 28 F.3d 1210 (4th Cir. 1994). Nor did Aviles' alleged threats earlier in the campaign create a general atmosphere of fear and reprisal that rendered a free election impossible.[7] See *Robert Orr-Sysco Food Services*, 338 NLRB 614 (2002); *Westwood Horizons Hotel*, 270 NLRB 802 (1984). Assuming the threats were made as alleged, they were made to only one eligible voter, there is no showing of dissemination, and the Union won the election by 16 votes. Accordingly, we find no merit to the Employer's exceptions to the hearing officer's disposition of its objections.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All production and maintenance employees including lead persons and plant clerical employees employed by the Employer at its facility now located at 6666 West 66th Street, Chicago, Illinois 60638-4904, but excluding all other employees, office clerical employees and guards, professional employees and supervisors as defined in the Act.

[6] See *Kentucky Tennessee Clay Co.*, 295 F.3d 436 (4th Cir. 2002) (alleged agents initially contacted union organizer; carried out organizing efforts within the plant "often at the direct request" of union organizer, who "placed the lion's share of the organizing work upon" them; spoke with employees not only in the workplace but through telephone calls to their homes; and were "the [u]nion's only conduits of information to the employees"); *Bristol Textile Co.*, 277 NLRB 1637 (1986) (employee at issue was union's conduit to employees in plant and was the only employee with whom union vice president dealt; also, employees perceived alleged agent as union's representative); *Bio-Medical of Puerto Rico*, supra; *Pastoor Bros. Co.*, 223 NLRB 451, 453 (1976) (employee committee members were union agents where union used committee members to solicit authorization cards, employees viewed committee as union's in-plant representatives, union used committee as its liaison with employees, and members of committee drafted handout that was reviewed and approved by union's legal counsel before distribution to employees).

[7] Aviles allegedly told employee Gerald Regnier that his "gang friends" would replace Regnier and attempted to show Regnier where he had been shot and stabbed by the gang.

MEMBER SCHAUMBER, concurring.

I join my colleagues in overruling the Employer's objections, and in their determination that employees Alfredo Aviles and Augustin Zapata were not agents of the Union with respect to the alleged objectionable conduct. Whether an employee has apparent authority under Section 2(13) of the Act will depend on the particular facts of each case. Under all the circumstances presented in the case under consideration, I agree that the Employer did not prove by a preponderance of the evidence that Aviles and Zapata were union agents. Nevertheless, I respectfully part company with some of the statements of law in the majority's decision. By way of example, I do not subscribe to any implication in the majority's decision that members of a union's in-plant organizing committee must be the union's "primary conduits for communication" or "primary employee contact[s]" before a finding of apparent authority is warranted. Since I agree with the result the majority reaches, I find it unnecessary to comment further on the majority's characterization of prior Board decisions and their applicability here.